

No. 84-267

Office - Supreme Court, U.S.
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OCT 22 1984

IN THE
Supreme Court of the United States
October Term, 1984

ALEXANDER L. STEVAS,
CLERK

WILLIAM P. CLARK, *et al.*,

Petitioners

v.

SOUTHERN OREGON CITIZENS AGAINST TOXIC
SPRAYS, INC.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF THE NATIONAL FOREST PRODUCTS
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT
OF THE PETITION**

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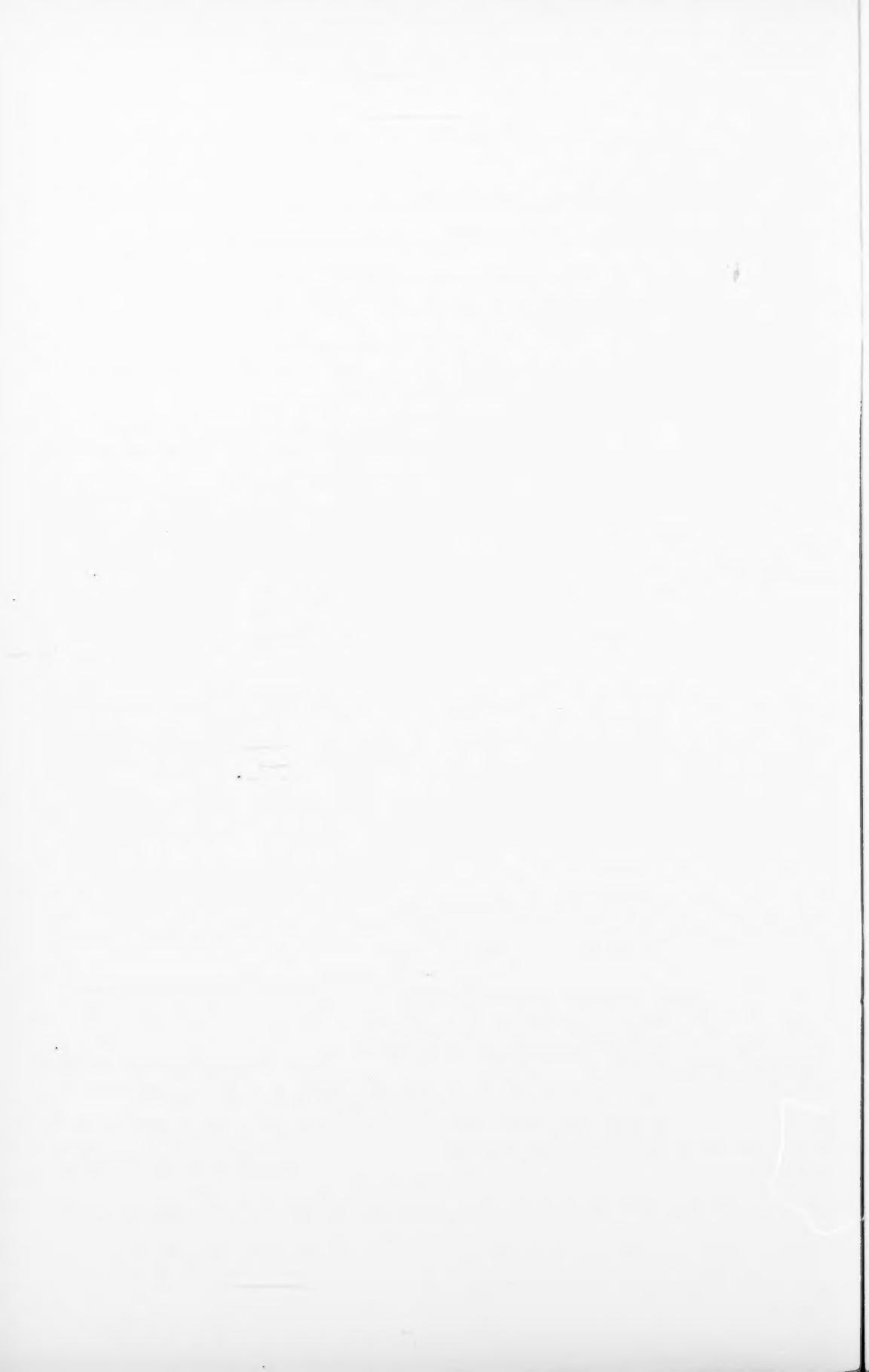
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**BRIEF OF THE NATIONAL FOREST PRODUCTS
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Amicus curiae National Forest Products Association urges the Supreme Court to grant the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTEREST OF *AMICUS CURIAE*

The National Forest Products Association ("NFPA") is a non-profit corporation founded to promote the conservation and renewal of forest resources and to improve

forest utilization and forestry practices. NFPA is a trade association which represents both: (1) individual member companies that manage forest lands and manufacture solid wood products; and (2) regional forest products trade associations. In total, NFPA represents more than 2,000 individual firms in the forest industry.

Members of NFPA purchase federal timber and are interested in maintaining the ability of the Bureau of Land Management ("BLM") and other federal land managing agencies to use safe and effective pesticides in managing federal forest lands. Many members of NFPA operate manufacturing facilities which depend substantially on timber resources purchased from BLM and other federal land managing agencies for raw material.

This brief is submitted by *amicus curiae* NFPA to urge the Supreme Court to grant the government's petition for a writ of certiorari and to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. If the decision below is allowed to stand, it (along with other decisions now pending on a motion for rehearing before the Court of Appeals for the Ninth Circuit) will significantly reduce the ability of BLM and other federal land managing agencies to manage their forest lands for timber production.

SUMMARY OF ARGUMENT

The court of appeals' misinterpretation of a federal agency's responsibilities under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, with regard to herbicide applications will cause substantial nationwide losses in forest productivity and jobs. *Amicus curiae* NFPA can speak to these impacts better than federal petitioners.

In addition, the court of appeals' dramatic and improper expansion of NEPA in this case is being applied in situations other than herbicide applications, unnecessarily delaying and increasing the costs of a variety of federal actions. Finally, the decision of the court of appeals would require federal agencies interested in using pesticides to replicate the costly and time-consuming health risk assessment already performed by the Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*¹

The Court should grant the petition for a writ of certiorari, because without the Court's review, the substantial, nationwide problems caused by the court of appeals' decision will continue unabated.

ARGUMENT: REASONS FOR GRANTING THE PETITION

The Court of Appeals' Misinterpretation of NEPA Imposes Substantial and Unnecessary Costs on Agencies that Manage Federal Timber and on In- dividuals Dependent on a Reliable Supply of Timber from Public Lands

The decision of the court of appeals in this and subsequent cases misinterpreting and expanding NEPA, has virtually stopped vegetation management in federal forests nationwide.² In so doing, this decision will cause substan-

¹FIFRA § 2(u) defines the term "pesticide" as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest" 7 U.S.C. § 136(u). "Pesticide," therefore, is a generic term including insecticide, herbicide, fungicide, etc.

²Three subsequent cases rely on this decision in determining a federal agency's NEPA responsibilities in a pesticide spray project. In *Merrell v. Block*, Nos. 83-3887 and 83-3916 (9th Cir. Jan. 27, 1984, *petition for rehearing pending*) the court of appeals held that BLM

tial, nationwide losses in: (1) productivity of federal forests; (2) availability of grazing lands (due to the spread of noxious weeds); and (3) opportunity for employment harvesting timber and manufacturing wood products. In addition, the public is faced with potentially higher costs for paper and solid wood products due to diminished supply of raw materials. These losses are avoidable because they have been caused by a misinterpretation and improper expansion of NEPA. Review by this Court is necessary to remedy the situation.

As a direct result of this and subsequent decisions in the Ninth Circuit, herbicide spraying on BLM and U.S. Forest Service lands in the Pacific Northwest has been enjoined. As an indirect result, the Forest Service announced on April 2, 1984 that "[a]ll aerial application of herbicides on [all] national forest lands will be deferred while the U.S. Department of Agriculture's Forest Service develops procedures to address recent court rulings . . ."³ More than six months later, that "deferral" remains in effect.

Herbicides are used to control vegetation which competes with commercial tree species for sunlight, water, and

and the Forest Service relied too heavily on EPA data. In *Save Our Ecosystems v. Clark*, No. 83-3908 (9th Cir. Jan. 27, 1984, *petition for rehearing pending*) the court rejected as inadequate BLM's worst case analysis for use of the herbicide 2,4-D, prepared as a result of the instant case. In *Northwest Coalition for Alternatives to Pesticides v. Block*, Civ. No. 82-6272 (D. Ore. Jan. 6, 1984), *appeal pending*, No. 84-3821 (9th Cir.), a district court enjoined all herbicide use by BLM in Oregon and by the Forest Service in Oregon, Washington, and northern California stating that the court of appeals' decision in the instant case left it no choice but to issue a total ban on herbicide use by the two agencies.

³United States Department of Agriculture, Forest Service to Defer Aerial Application of Herbicides, Press Release No. 342-84, April 2, 1984.

soil nutrients. Herbicides are not applied to all forest lands, just to those which need them. Furthermore, even in those areas where herbicides are necessary they are commonly used no more than twice in a tree's growing cycle of 50 years or more. Vegetation management with herbicides in areas where it is needed can double forest productivity.⁴ In areas most critically in need of vegetation management, a single application of a herbicide can make the difference between a forest with a considerable commercial value and one with little or no commercial value at all.

Congress requires that both BLM and the Forest Service manage some of their lands for the supply of timber on a sustained basis.⁵ This decision threatens to seriously diminish the ability of these agencies to carry out their Congressional mandate to manage timber. Failure to carry out that mandate is more than a philosophical or theoretical problem. For example, BLM estimated that a ban on herbicide use would reduce annual timber yields on its lands in Oregon covered by this case by 25%, resulting in re-

⁴"[C]onifer volume in a stand can be doubled by controlling weed trees and shrubs . . ." See R. Stewart, Timber Management Research, United States Department of Agriculture, Forest Service, *Effect of Weed Trees and Shrubs on Conifers — A Bibliography with Abstracts* (1981).

⁵BLM is required by the Oregon and California Railroad and Coos Bay Wagon Road Grants Lands Act of 1937, 43 U.S.C. § 1181a *et seq.*, to manage public timberlands in western Oregon for the purpose of providing a "permanent source of timber supply . . . and contributing to the economic stability of local communities and industries . . ." 43 U.S.C. § 1181a. In the very statutory section in which Congress established the national forest system in 1897, it declared that one of the purposes of the national forest is "to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . ." Organic Administration Act of 1897, 16 U.S.C. § 475.

venue loss to federal and local governments in excess of \$20 million per year.⁶

Federal timber managers will also incur increased administrative costs as a result of the court of appeals' decision. These agencies will have to rewrite federal timber sale offerings and possibly forest planning documents to reflect reduced estimates of forest productivity and reduced ability (without herbicides) to regenerate the forest after harvest.

An additional, though less quantifiable, impact of the decision of the court of appeals is the delay, uncertainty, and instability imposed on federal forest management. These conditions reduce the ability of federal agencies to properly manage one of our nation's most important, valuable, and renewable resources.

Reduced forest vegetation management and productivity means reduced income to the private sector as well as the public sector. Reduced federal timber sales in the future will critically affect the timber industry. In some areas the federal government is the major forest land owner. Its land base available for growing commercial crops of timber is frequently reduced for a variety of purposes including wilderness, roadless areas, hunting, camp-

⁶Bureau of Land Management, U.S. Department of the Interior, Vegetation Management With Herbicides Western Oregon - Final Environmental Statement 1978. To put these figures in perspective, in 1983 the Forest Service sold \$774 million worth of timber, approximately 25% of which is distributed to the counties from which the timber was cut. "Report of the Forest Service - Fiscal Year 1983" U.S. Department of Agriculture, Forest Service, Washington, D.C., February 1984. Similarly, according to Hank Noldan, Director of Timber Management, Bureau of Land Management, BLM receipts from timber sales for fiscal year 1984 totaled more than \$133 million, 50% of which is distributed to counties.

ing, and other uses. Thus, it is imperative that the remaining productive acreage be managed effectively. While the impacts of reduced forest productivity are not immediate, federal land managers will never be able to regain the lost growth potential. Reducing the productivity of the remaining land, on which the forest industry relies, will eventually create hardship in some areas. That hardship will include not only lost income, but lost jobs for those who harvest, transport, and manufacture forest products.

Oregon, for example, is a state heavily dependent on federal timber. In Oregon, where 78% of the timber is publicly owned, the forest industry directly employs 62,000 people. In 1983, the forest industry in Oregon produced lumber with an estimated wholesale value of over \$1.7 billion.⁷ Lost productivity on federal lands could in the future have a devastating effect on the forest industry in Oregon and the economy of that State.

Should the current halt in forest vegetation management extend for a number of growing seasons, the loss in productivity may create a sufficient reduction in supply to cause increased prices of forest products to consumers.

Amicus curiae NFPA stresses the impact of lost productivity on federal forest lands, but the Ninth Circuit decision has also caused other problems. Herbicides are customarily used on leased federal grazing lands to control noxious weeds which can harm cattle and sheep. This decision will reduce federal income because less grazing land will be suitable for lease or because land will be leased at a reduced rate due to reduced forage value. Similarly, the private sector will be affected by the lost availability of

⁷Western Wood Products Association Economic Services Department, 1983 Statistical Year Book of the Western Lumber Industry (1984).

grazing land which is already scarce in some areas. This decision may also affect herbicide use by the federal government for weed control along rights-of-way for road safety.

**The Court of Appeals' Misinterpretation of
When NEPA Requires a Worst Case Analysis
Will Delay and Increase the Cost of a Wide
Variety of Federal Actions**

The court of appeals' decision on when NEPA requires a worst case analysis warrants review by this Court. The Council on Environmental Quality regulations (40 C.F.R. § 1502.22) require agencies to perform a worst case analysis when "the information relevant to adverse impacts [of a proposed project] is important to the decision and the means to obtain it are not known . . ." See Petition for Writ of Certiorari at 6. The misapplication of the worst case analysis requirement has been the primary cause of the lost forest productivity discussed above. Worst case analyses have not only been broadly required in proposed federal herbicide projects in the Ninth Circuit, but have been required in proposed federal insecticide projects and timber sales.⁸

The delays and losses experienced in federal forest vegetation management are likely to be only the beginning for BLM, the Forest Service, and federal agencies in general. Many proposed federal projects will have to contend with worst case analyses under the court of appeals' requirement that federal agencies perform a worst case analysis whenever there is a mere difference of opinion in

⁸See *Committee for Integrated Pest Management v. Block*, Civ. No. 82-0570 (D.N.M. Mar. 5, 1984), and *National Wildlife Federation v. United States Forest Service*, Civ. No. 82-1153-50 (D. Ore. Aug. 6, 1984), as amended on reconsideration.

the scientific community over adverse impacts of a proposed agency action. In the court of appeals' view, only a very small amount of scientific uncertainty is needed to trigger a worst case analysis. Without guidance from this Court, virtually every federal project will be at risk unless a worst case analysis is performed. Initial experience with worst case analyses indicates that this is a costly, time-consuming, and difficult requirement to meet. See *Save Our Ecosystems v. Clark, supra*. Requiring a worst case analysis in virtually all cases, rather than those in which it is needed, cannot be justified.

The Court of Appeals' Requirement that BLM Independently Assess the Safety of Herbicides Will Cost the Federal Government Millions of Dollars To Duplicate Work Already Done

The court of appeals has stated clearly that "BLM must assess independently the safety of the herbicides that it uses."⁹ Notwithstanding the fact that a number of Ninth Circuit decisions have discussed the appropriate relationship between the FIFRA pesticide registration process and NEPA, there remains a strong need for this Court to settle the nagging and potentially costly question of how much work done by the Environmental Protection Agency must be duplicated by another agency in the NEPA process.¹⁰

The nature and extent of proper reliance on and use of EPA's pesticide registration information and risk analysis in the NEPA process is an important question with nation-

⁹*Southern Oregon Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475, 1480. (9th Cir. Dec. 2, 1983).

¹⁰See *Oregon Environmental Council v. Kunzman*, 714 F.2d 901 (9th Cir. 1983); and *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908 (D. Ore. 1977).

wide impact. It deserves the attention of this Court, now, so that federal agencies can fulfill their statutory duties in an orderly and predictable fashion. Although federal agencies cannot meet their NEPA obligations by relying *exclusively* on the conclusions reached by other agencies,¹¹ it is clear that agencies cannot ignore the data and conclusions of another agency.¹² The requirement not to ignore the data of another agency should be particularly strong when, as here, that agency has been charged by Congress with primary responsibility for ascertaining that information. This Court needs to explain that BLM need not, indeed must not, assess herbicide safety independently from EPA.

It would be wasteful and senseless for federal agencies proposing to use pesticides to ignore the valuable data and expertise of EPA. "Data contained in a typical registration package for a single new pesticide represent an investment of \$20 to \$25 million and eight to ten years of laboratory, field and environmental testing."¹³ Even if it were possible for BLM to maintain a staff with the necessary expertise, it would be very expensive and time consuming to require BLM to duplicate these studies in the NEPA process.

¹¹See *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971); *Citizens Against Toxic Sprays, Inc. v. Bergland*, *supra*; and *Oregon Environmental Council v. Kunzman*, *supra*.

¹²*Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

¹³Federal Insecticide, Fungicide, and Rodenticide Act: Hearings on H.R. 5203 Before the Subcomm. on Department Operations, Research and Foreign Agriculture of the House Comm. on Agriculture, 97th Cong., 2d Sess. 39 (1982) (statement of Dr. Jack D. Early, President, National Agricultural Chemicals Association).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1984